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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 542

PAUL WM. VORT, ERNEST NAUEN, and PAUL WM. VORT and JULIAN H. BASCH, as Trustees, u/w of FRED BASCH, Deceased, *Petitioners*

v.

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian

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On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court filed on April 11, 1951 (R. 75-86) is reported at 99 F. Supp. 57. The supplemental opinion filed on May 1, 1951

(R. 86-87) is reported at 108 F. Supp. 263. The *per curiam* opinion of the Court of Appeals (R. 1302) is reported at 199 F. 2d 782.

JURISDICTION

The judgment of the Court of Appeals was entered on October 13, 1952 (R. 1304). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the concurrent findings of fact by the lower courts that petitioners were not the beneficial owners of 408 shares of stock in Herman Basch & Co. and therefore not entitled to a return under Section 9(a) of the Trading with the Enemy Act were clearly erroneous.

2. Whether that Act validly imposes upon a claimant the burden of establishing his right, title and interest in vested property.

3. Whether there was error in awarding interest to the Government upon dividends which petitioners were found to be holding for the benefit of Germans.

STATUTES INVOLVED

The relevant portions of the Trading with the Enemy Act, as amended, are set forth in the Appendix to the petition for a writ of certiorari in No. 541, this Term, pp. 28-34.

STATEMENT

The cross-petition for a writ of certiorari is chiefly devoted to an attack on the correctness of the findings of fact made by the District Court and affirmed by the Court of Appeals from which the courts concluded that petitioners were not the beneficial owners of 408 shares of stock in Herman Basch & Company and accordingly were not entitled to their return under Section 9(a) of the Trading with the Enemy Act. We here summarize the facts which we believe clearly support the conclusions reached below.

It is not disputed that before the purported sales in 1939, Thorer & Company, a German partnership, owned all of the 500 shares of Althor, Inc., a holding company, which, in turn, owned all of the stock of Herman Basch & Company.

In 1937, a Jewish Boycott Committee engaged in an attempt to stop all dealings with German-owned firms, or firms which dealt with Germans. The Basch Company was suspected of being German owned; therefore, to ward off a possible boycott, petitioner Vort and Fred Basch (the trustees of whose estate are among petitioners here), among others, stated orally and in writing to the Committee that the Company was not German owned, and that there was only an option running to the German Thorer & Company, not ~~exercisable~~ exercisable until 1942, and then only on such onerous terms that it would never be exercised. These represen-

tations, which are now admitted to have been false (Cross-Pet. App. p. vi), were, for a time, accepted. In the later part of 1938 and early January, 1939, the Boycott Committee demanded documentary proof that the Basch Company was not German owned (R. 1232). A conference was held on January 19, 1939, in which petitioner Vort, Fred Basch, and petitioner Nauen participated, and to support the story that the company was owned by the Basch estate and that the Thorers held only an option, an admittedly fictitious stock certificate showing American ownership and a fictitious option in favor of Thorer & Company were executed. Both were dated back to November, 1936 (R. 1105-6, 249).

During the same period, Paul Hollender, a partner in the German Thorer & Company, began to fear that the heightened political tension between Germany and the United States might lead to seizure of German assets in America (R. 1217, 1254). Conferences were held and letters written in which Americanizing the Althor company was discussed (R. 370, 1229-1244), and these culminated in a Trenton, New Jersey, conference in February, 1939.[1] Herbert Schoenburg and Otto Nauen came over from Germany to represent

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[1] The plan used at Trenton was laid out in a letter by Ward to Hollender and Mahler, dated January 27, 1939 (R. 1233-1240). That letter makes plain that the transaction was sham.

the seller, Thorer & Company; the purchasers—Vort, Ernest Nauen, Fred Basch, Ward, Mahler, Koch, Stevenson and Klein—all participated in the 3-day conference with the Germans (R. 326, 417, 562).

At Trenton, the 500 shares of Althor, Inc. were purportedly sold to Vort (89 shares), Fred Basch (89 shares), Ernest Nauen (49 shares), Klein (18 shares), Ward (95 shares), Koch (95 shares—70 for Curt Mahler) and Stevenson (65 shares—30 for Mahler). The price was $200 a share. 125 shares were sold outright; 50 to Fred Basch, 50 to Vort, and 25 to Nauen.[2] The remaining 375 shares, including 102 taken by Vort, Basch, and Nauen, were sold subject to a repurchase option at $220 a share running to Thorer & Company (R. 1149). All of the 500 shares were placed in escrow (R. 1110), and all of the 500 shares were subject to cross-options (R. 1113) whereby no shares could be sold without first being offered to the other purchasers.

The total sale price of $100,000, or $200 a share was, as the District Court found, insignificant as compared to the real value of the stock. There was competent evidence that the book value of the stock in 1938 was $684.47 a share (R. 787) and that the stock earned $260.25 a share in that year, more than the sale price per share (R. 978-980). Even

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[2] These shares were not vested.

plaintiffs' accountant termed the price "ridiculous" (R. 979-980).

Vort acted before the Trenton conference and at said conference for himself and Fred Basch and Nauen, yet he never discussed the price to be paid for the shares (R. 539). Neither Vort nor Nauen made any financial analysis of any kind (R. 513, 547-548, 561). The price was set by Schoenburg, representing the sellers (R. 548), just as he imposed the conditions of the repurchase option, the cross-options, and the escrow (R. 163, 326, 548, 555, 708, 729).

Each purchaser received, in one form or another, money from the Basch Company or related companies in almost the exact amount required for his payments. Koch, who took 25 shares for himself, needed $5,000, and received $5,000 in bonuses or advances (R. 404-405, 423, 1125-1126). Stevenson, who took 35 shares (17 for his associate Lancaster), needed $7,000, and received $7,000 from the Basch Company for past and future legal services (R. 258). Ward, who purchased 95 shares, needed $19,000, and was paid $19,000 for legal services purportedly rendered to Thorer & Hollender dating back to 1932 (R. 327, 923, 1249). Mahler paid for the 100 shares which were purchased for him by drawing $20,000 out of the Basch Company (R. 578). Klein testified that he paid for his 18 shares with his own money, but he could not recall what bonuses, fees, compensa-

tions or dividends he received from Basch Company in 1939-40 (R. 233-235).

Vort, Basch, and Nauen paid for the 227 shares they purchased with their own checks, but were given Basch Company checks in the same amount, which were charged against their accounts with the company (R. 150-151, 687-689, 1073). The 102 "optioned shares" called for a payment of $20,400. Either at the Trenton conference or shortly before or after, Vort, Basch, and Nauen were given "special bonuses" totalling $21,000 (R. 576).

Thus substantially all of the money paid for the shares transferred at Trenton came initially from Herman Basch & Company. The District Court found (R. 80-81):

> The purchase price of the sale of stock came largely from dividends and bonuses from Basch & Company, part by means of advance payment for legal services; that which purported to be paid by the plaintiffs consisted of dividends and bonuses declared nearly two months after the close of business on December 31, 1938.
>
> * * * There seems to be *no doubt* that in fact the money purported to have been paid to the Germans was really their money either in Basch & Co. or Thorer & Hollender. [Italics added]

In April of 1940, after war had broken out in Europe, the United States instituted "freezing controls" against United States property owned by nationals of various European countries (Executive Order 8389, April 10, 1940, 5 F.R. 1400). Vort and Stevenson feared that controls would be extended to German property in the United States (R. 608, 610). Ward feared that the option might be seized (R. 328, 357-360). Whatever the reason, the parties negotiated with Paul Hollender, and in December, 1940 the stockholders ostensibly bought the German repurchase option. It was paid for as follows: On December 11, 1940, the Basch Company declared a $70,000 dividend to Althor, Inc., and it, in turn, after deducting $6,000 for taxes and expenses, declared a $64,000 dividend to the stockholders on December 12 (R. 1131-1132). On December 13, the option was cancelled upon payment of $64,000, $1,000 of which was deducted for expenses (R. 1266; 1132-33). Each stockholder paid $128 per share. Vort, Basch, and Nauen, who held 102 "optioned shares" and 125 "unoptioned shares," paid $128 on all of their shares whether optioned or unoptioned (R. 158, 612-15, 628-31, 752-753). The evidence showed that the stock was then worth $923.09 a share (R. 787), as compared with the option price of $220 a share.

Some of the stockholders complained of the increased tax rates brought about by the $64,000

dividend (R. 312-313, 365, 1267), and a suggestion was made that there be reimbursement by Althor (R. 1267). On January 31, 1940, less than two months after the first dividend, an additional and unusual dividend of $30,000 or $60 a share was declared by Althor (R. 622, 1267-1268).

The District Court found that this cancellation was fictitious, that German money was used, and that the Germans still remained in control (R. 82-83).

In August or September, 1941, the cross-options and the escrow agreement were terminated (R. 166) and the stock certificates were turned over to the individual shareholders in October (R. 166, 266). This transaction was predated to January 1941 (R. 1112, 1117).

The District Court found these cancellations were a continuation of the plan of concealment at a time when the stockholders were required to file affidavits with the Treasury that they were the true owners of the stock (R. 84).

In 1944, Althor was dissolved and its assets, the Basch shares, were distributed among its stockholders on a basis of 4 shares of Basch for 1 of Althor (R. 154-155).

ARGUMENT

1. This cross-petition raises, for the most part, only questions of fact which the District Court and the Court of Appeals have determined ad-

versely to petitioners. It is not disputed that the 408 shares of stock involved were German owned on February 17, 1939, nor is it disputed that record title to them was transferred to petitioners on February 18, 1939. The basic question is whether that transfer was bona fide or whether it was a sham transaction intended to conceal the continued German ownership. If it was a sham, as the courts below found, then it is well settled that petitioners may not recover. *Stoehr* v. *Wallace,* 255 U.S. 239, 251; *Standard Oil Co.* v. *Clark,* 163 F. 2d 917, 923 (C.A. 2), certiorari denied, 333 U.S. 873; *Kind* v. *Clark,* 161 F. 2d 36, 46-47 (C.A. 2), certiorari denied, 332 U.S. 808; *Beck* v. *McGrath,* 182 F. 2d 315 (C.A. 2); *Thorsch* v. *Miller,* 5 F. 2d 118 (C.A.D.C.), appeal dismissed, 274 U.S. 763; *Matheson* v. *Hicks,* 10 F. 2d 872 (E.D.N.Y.). This finding is fully supported by the record, the Court of Appeals found it to be supported by "substantial evidence" (R. 1302), and no useful purpose would be served by a re-examination of the evidence by this Court.

However, in view of the vigor with which petitioners attack the correctness of the findings below, we shall show that far from being "clearly erroneous" they were clearly correct.

At the outset it should be noted that this case does not present the broad question whether there was any "cloaking" at all of the Althor stock "sold" at Trenton. Petitioners do not seriously challenge

the finding that 51% of the stock purchased at Trenton was "cloaked" by other purchasers at the conference for the German vendors; indeed, in this Court they tacitly admit it. See e.g., "Factual Summation," Cross-Pet., pp. 20-21. So the real issue here is the narrow question whether it was error to include petitioners in that conspiracy. They claim error because there was evidence to show that they were not trusted by the vendors, or by the 51% group, that Jews (as were some of petitioners) were not allowed to "cloak", and that for years they, as the management group, had sought to own a part of the company. They also claim complete ignorance of the conspiratorial communications and any "cloaking" arrangement at Trenton, and that the contemporaneous documents absolve them.

Basically, however, there was nothing about the Trenton transaction, or the factors leading up to it, to stamp it as a genuine sale. It followed as a direct consequence of the fraudulent representations which for two years had been presented to the trade in an effort to hide the fact that the Basch Company was German owned.[3] It was admittedly consummated in secrecy. All of the conditions of

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[3] During this period the Basch corporate books were changed to hide any German connections. Money owing to Mahler was carried as "Accrued Expenses", because, as Vort testified, "we did not want to show that Curt Mahler had an account with us." (R. 577) Debts owing to Thorer & Company, the

sale, the "ridiculous" price, the repurchase option, the cross-options, and the escrow agreement were imposed by the German sellers. There was no arms-length discussion of price. And each purchaser received in one way or another from Basch & Co. almost the exact amount required to pay for the shares allotted to him. The repurchase option was bought and paid for by the simple expedient of declaring a dividend in the exact amount required. No distinction was made between optioned and unoptioned shares, each stockholder paying pro rata on all the shares held. An additional dividend was declared which reimbursed the stockholders for the taxes on the original dividend. The cross-options and escrow agreements were cancelled in September or October of 1941 just before the stockholders were required to make a report to the Treasury Department that they were the owners of the stock; these cancellations were pre-dated nine months. (See *supra*, pp. 3-9.)

In short, in the language of this Court, the sale:

> * * * was not prompted by commercial motives, nor based on an estimate of mutual advantages, and was not intended as a genuine business transaction, but was made to avoid

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German parents, were carried as "Sundry Loans Payable." (R. 678-679) Rebates paid annually to Thorer & Hollender, another American affiliate of Thorer & Co., were listed as "Sales Allowances." (R. 939)

> inconveniences which otherwise might ensue from a state of war; and that the parties intended to leave the beneficial ownership in the German corporation and not pass it to the New York corporation. * * * On no other theory can the acts of those who were concerned be explained or their declarations reconciled. [*Stoehr* v. *Wallace,* 255 U.S. 239, 251.]

Petitioners contend, however, that the trial court erred in drawing adverse inferences from the fraud practiced by them on the Boycott Committee, although they do not deny that they participated in that fraud and that, only a month before the Trenton conference, fictitious documents were prepared for the purpose of concealing the German ownership of the Basch Company. But this Court has held that when "a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct toward another, at about the same time, and in relation to a like subject, was actuated by the same spirit." *Butler* v. *Watkins,* 13 Wall. 456, 464. And in *Hodgskin* v. *United States,* 279 Fed. 85, 93 (C.A. 2), a World War I Trading with the Enemy Act case, it was held that "the defendants' efforts by suppression of truth, if not the suggestion of falsehood, to convince one particular enemy of Germany that Heyden was not German-owned and German-controlled, was relevant and material

evidence of long established purpose and intent." See also *Standard Oil Co.* v. *Clark,* 163 F. 2d 917, 924 (C.A. 2), certiorari denied, 333 U.S. 873, referring to "other known instances of practical deception by Jersey as to the legal devices employed, such as concealment from English interests * * * or like concealment from Jersey's cooperating domestic companies" as relevant to the issue whether certain 1939 transfers were sham. The intent of the parties at the Trenton conference was a basic question in this case, and the trial court found that "apart from every other consideration they [petitioners] were willing, in order to acquire the stock, to continue to join in the conspiracy and assist in protecting the German interest" (R. 81).

Petitioners also contend that they were not consulted about the sales prior to the Trenton conference and that the contemporaneous documents absolve them. Yet Vort attended a conference on February 1, 1939, at which the "sale of Thorer interest" was discussed (R. 1181-1182), and also one on February 16 concerning "this contemplated sale". (R. 370) And on January 19, 1939, Mahler outlined the transaction in a cable (R. 1232) and he testified he must have obtained the information from petitioners (R. 310-311).

In the final analysis, petitioners' real complaint is that the trial court did not give sufficient weight to the testimony which they claim absolved them

from any part of the "cloaking" transaction. But that is not reversible error, for an "appellate court may not reweigh the evidence or override the findings, except where it clearly appears they are manifestly wrong." *Nolan* v. *Werth,* 142 F. 2d 9-10 (C.A.D.C.). That is particularly true in a case such as this where the findings are "almost entirely concerned with imponderables, such as the intent of parties" to the transactions. *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 340, 342.[4]

2. In the circumstances of this case, there was no error in admitting evidence of the Thorer & Hollender conspiracy. The connections between Thorer & Hollender and the Basch Company were numerous and so close that evidence about the former company was necessary to clarify the facts about Basch. Paul Hollender was interested in both companies (R. 401) and Mahler was the manager of "T. & H." (R. 109). Thorer & Hollender was a large customer of Basch (R. 377) and received rebates from it (R. 162). Prior to

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[4] Contrary to the assertion of cross-petitioners (Cross-Pet. 7), this case did require the resolution of conflicting testimony. The contemporaneous documents implicated petitioners, as is shown *supra* p. 14. Both Vort and Nauen took the stand and testified extensively; both categorically asserted that the whole Trenton transaction was bona fide. Their testimony raised a conflict with the documentary evidence; and the trial judge disbelieved them. Their credibility was thus directly in issue.

the 1939 Trenton conference the Basch Company dividends were paid to Thorer & Hollender through Althor, Inc. and not sent directly to Germany (R. 193, 468-469, 475). The boycott involved both companies (R. 341). Mr. Markham, the then Deputy Alien Property Custodian, who was called as petitioners' witness, testified on direct examination that in his discussions with Mr. Cowen (see Petition for certiorari in No. 541, this Term, pp. 8-10, 11-23) the things said about Basch and about Thorer & Hollender were interwoven (R. 115) and that he thought the Thorer & Hollender people were getting out of Basch at the 1943 sale (R. 141). At the Trenton conference, $2,500 of the money put up by Koch came from Thorer & Hollender (R. 354). Ward's $19,000 also came from Thorer & Hollender and was charged on Thorer & Hollender's books to their Basch account (R. 911). Moreover, there was evidence that the $100,000 paid at Trenton for the stock was remitted to Thorer & Hollender (R. 312).

In any event, petitioners may not object to this evidence since it was they who first went into the matter (R. 107, 109, 115, 141, 162, 193, 297, 307, 467-469, 471, 475, and see plaintiff's Exhibits P-DJW-81 (R. 1097), P-DJW-191 (R. 1103-1104), and P-DJW-209a (R. 1107). That no prejudice resulted to the petitioners is shown by the careful way in which the District Court handled the matter. The court found that peti-

tioners knew of the conspiracy in regard to Thorer & Hollender, but that they were not participants in it (R. 86). It specifically ruled the evidence admissible to show that petitioners had knowledge that Ward and Koch were affiliated with the Germans in regard to the 1943 and 1947 sales (*ibid*).

3. Error is claimed in that the District Court imposed upon petitioners the burden of disproving fraud, and it is contended that the Trading with the Enemy Act is unconstitutional in imposing upon claimants to vested property the burden of proof. In petitioners' view of this case, it was incumbent upon the Government to prove by clear and convincing evidence that they engaged in a criminal conspiracy to defraud the United States in time of war. This assumes too much. Wartime seizures of enemy property are not penal. *Miller* v. *United States*, 11 Wall. 268, 305.

Section 9(a) of the Act, under which this action was brought, provides that any person not an enemy or ally of enemy "may institute a suit . . . to establish the interest, right, title, or debt . . . claimed, and if . . . established" the court will order a return. The constitutionality of this remedy, given to persons whose property has been erroneously seized, has been repeatedly sustained. *Becker Steel Co.* v. *Cummings*, 296 U.S. 74; *Garvan* v. *$20,000 Bonds*, 265 Fed. 477, 479 (C.A. 2), affirmed, *sub nom. Central Union Trust Co.* v.

Garvan, 254 U.S. 554; *Kahn* v. *Garvan,* 263 Fed. 909, 916 (S.D.N.Y.); *Salamandra Insurance Co.* v. *New York Life Ins. Co.,* 254 Fed. 852 (S.D.N.Y.). Under the statute, the issue in this case is thus, not only whether petitioners have been guilty of misconduct, but whether they beneficially own the property sued for. *Standard Oil Co.* v. *Clark,* 163 F. 2d 917 (C.A. 2), certiorari denied, 333 U.S. 873.

Since petitioners claim the beneficial ownership of the stock they must establish it. *Fujino* v. *Clark,* 172 F. 2d 384 (C.A. 9); *Farmers' Loan & Trust Co.* v. *Hicks,* 9 F. 2d 848 (C.A. 2), certiorari denied, 269 U.S. 583. The courts have uniformly held that the plaintiff in a Section 9(a) suit has the burden of proving beneficial ownership. In *Thorsch* v. *Miller,* 5 F. 2d 118 (C.A.D.C.), the plaintiff claimed to have purchased stock in an American corporation in March 1917, before the declaration of war. There was evidence indicating that the sale was not absolute but colorable and that as late as September 1919 the sellers considered themselves to be the owners. The court held (5 F. 2d at pp. 122-123) that "the burden of proof respecting the ownership of the stock rested upon the claimant" and that claimant had failed to discharge that burden. Accord: *Beck* v. *Clark,* 88 F. Supp. 565 (D. Conn.) affirmed, 182 F. 2d 315 (C.A. 2); *Draeger Shipping Co.* v. *Crowley,* 55 F. Supp. 906 (S.D.N.Y.); *Feller* v.

McGrath, 106 F. Supp. 147 (W.D. Pa.). The same rule applies in prize cases. *The Benito Estenger*, 176 U.S. 568; *The Amiable Isabella*, 6 Wheat 1; *The Jenny*, 5 Wall. 183.

In any event, what the District Court thought of the weight of the evidence, apart from any question of burden of proof, is shown in the opinion. The court found that "it is *clear* that the whole Trenton transaction was a sham and that the Germans still retained the control of the company," and that it was "*satisfied* that the cancellation of the options was fictitious and that the Germans still remained in control" (R. 82, 83). (Emphasis added.) Not only did the petitioners fail to "establish" their beneficial ownership, but the Government proved that the beneficial ownership remained in the Germans.

4. The award of interest to the Government (R. 88) was not in conflict with the decision of this Court in *McGrath* v. *Manufacturers Trust Company*, 338 U.S. 241. That case denied interest sought by the Custodian as a species of penalty for failure to comply with a Vesting Order, but it specifically recognized that the Custodian might be entitled to interest where it was due to the persons to whose rights he had succeeded. 338 U.S. at 248-249. That was the situation here. Petitioners, being in the position of trustees, as "cloaks," were accountable to the German former owners for interest if they dissipated the divi-

dends, comingled them with their own funds, or failed to invest them. *Buder* v. *Fiske,* 174 F. 2d 260, 274-275 (C.A. 8); *First National in West Union* v. *American Surety Co.,* 148 F. 2d 654 (C.A. 4); *Mades* v. *Miller,* 2 App. D.C. 455. Accordingly, if there was any error in the award of interest it was in failing to award interest from 1940.

CONCLUSION

The decisions of the courts below on the questions presented by the cross-petition are correct, are not in conflict with the decision of any other court, and do not call for review by this Court. Moreover, it will not be necessary in order to resolve the questions presented in the petition for a writ of certiorari in No. 541, this Term to go behind any findings of fact. Accordingly, the cross-petition should be denied, regardless of what disposition is made of the petition in No. 541.

Respectfully submitted,

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FEBRUARY, 1953.

U.S. GOVERNMENT PRINTING OFFICE 1953—240732/P.O. 1094

IN THE

Supreme Court of the United States

October Term, 1952

No. 542

PAUL WM. VORT, ERNEST NAUEN, and PAUL WM. VORT and JULIAN H. BASCH, as Trustees, u/w of FRED BASCH, Deceased, *Petitioners*

v.

JAMES P. MCGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian

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On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

CROSS-PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Defendant emphasizes that the trial court's findings were found by the Court of Appeals "to be supported by 'substantial evidence' (R. 1302)". Brief in Opposition, p. 10 (hereinafter Br. Opp.) That test in a fraud case was plainly wrong. There the test is

> "whether the United States has carried its burden of proving by 'clear, unequivocal and convincing evidence', which does not leave the issue in doubt * * *." *Knauer* v. *United States*, 328 U.S. 654, 657.

1) For the most part defendant merely restates the findings and ignores the contemporary documents which render them untenable. When he points to the "contemporary documents [which] implicated petitioners, as is shown supra, p. 14", Br. Opp. 15, fn. 4, he immediately betrays the hollowness of his case. At p. 14, defendant states:

> "Yet Vort attended a conference on February 1, 1939, at which the 'sale of Thorer interest' was discussed, (R. 1181-1182), and also one on February 16 concerning 'this contemplated sale'. (R. 370) And on January 19, 1939, Mahler outlined the transaction in a cable (R. 1232) and he testified he must have obtained the information from petitioners (R. 310-311)."

The February 1 citation is to a day note by lawyer Stevenson simply recording a meeting to disuss a sale. The equivocal nature of this note is underscored by Stevenson's deposition testimony that

> "the background of the sale was the pushing of Fred Basch and Paul Vort to get the Germans out on account of this boycott situation." R. 250. See also App. Cross-Petition, viii.

Respecting the February 16th meeting, defendant's citation (R. 370) is to Klein's testimony that he had a meeting with Fred Basch, Paul Vort and Mrs. Herman Basch to discuss the

> "contemplated sale of the stock. We wanted to know what effect it might have on the royalty agreement, because we feared that if the stock went into the hands of competitors we might be in difficulty."

Why should plaintiffs have feared a sale to competitors if all the plans of the Trenton transaction had been confided to them? Finally, Respondent refers to Mahler's cable of January 19, 1939, wherein "he outlined the transaction" and testified that "he must have obtained the information from petitioners." Supra, p. 2. The cited cable states in pertinent part:

> "New division of shares should be as follows less than half should go to Crown Princes rest to the people here whom you can really trust Stop First group has about $50,000—for second group part of the amounts mentioned by you can be used * * *." R. 1232.

At R. 310-311, cited by defendant, Mahler explained his phrase "first group has about $50,000" as meaning that

> "according to the cable they must have had this available in liquid form. * * * I apparently was assured by one of them [plaintiffs] that they could raise approximately $50,000."

Thus Mahler's cable shows on its face the line always drawn between the Crown Princes and those whom the Germans "can really trust". And it shows the same demarcation drawn in terms of the moneys to be employed to purchase the shares. The Crown Princes would employ their own $50,000, which they then had "available", the "second group", those who could really be trusted, were to use "amounts mentioned" by Hollender.

These pitiful few documents are all that Petitioner could muster in support of his assertion that "the contemporaneous documents implicated petitioners." Supra, p. 2.[1] In reading Respondent's Brief in Opposition, we

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[1] Ignoring our demonstration to the contrary, Appendix to Cross-Petition, p. x, defendant states (Br. Opp. 8) that

> "Vort and Stevenson feared that controls would be extended to German property in the United States. (R. 608, 610)."

At the cited point Vort testified:

> "Stevenson told us that there were rumors about that the United States was going to freeze foreign funds from Germany, and it might be a good opportunity for us to make a very beneficial arrangement to eliminate that re-purchase right * * *."

Patently, Vort did not "fear" freezing controls; he welcomed the possibility as affording leverage to terminate the re-purchase option.

ask the Court to bear in mind that defendant's repeated references to letters and negotiations will without exception prove to be communications which were not addressed to or confided in plaintiffs, or negotiations in which they did not participate. See App. Cross-Petition, x-xi, vii at fn. 3.

Respondent would wring from the plaintiff's participation in the representations to the boycott committee an inference that they meant similarly to deceive the United States. Br. Opp. 13.[2] First, plaintiffs made full disclosure in 1940 to the government of prior German ownership, a disclosure never made to the boycott committee. App. to Cross-Petition, vii. Second, any unfavorable inference drawn from the boycott representations must yield to the contemporary documents which show that

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[2] In this connection, defendant cites three facts:

"Money owing to Mahler was carried as 'Accrued Expenses' * * *. Debts owing to Thorer & Company, the German parents, were carried as 'Sundry Loans Payable'. * * * Rebates paid annually to Thorer & Hollender, another American affiliate of Thorer & Co., were listed as 'Sales Allowances'." Br. Opp. 11 at fn. 3.

Petitioners disclosed to the court that they were constrained in self-defense to make misrepresentations to the boycott committee. See Appendix to Cross-Petition vi-viii. The appearance on the books of substantial loans from Thorer & Company could only give rise to embarrassing questions by the boycott committee which had to be avoided in view of prior misrepresentations as to the cutting of German ties. The change of the account due Mahler, under a contract of employment, to "Accrued Expenses" was repeatedly explained as designed to forestall trade jealousy of the fact that Mahler, an officer of Thorer & Hollender, a fur dealer, enjoyed special privileges, which competitors would jealously view as a special rebate. See R. 530, 533, 255, 913-914, 1126. For the same reason it was felt essential to disguise the rebates to Thorer & Hollender. An inference of corruption is rebutted by the contemporary documents which show that repeatedly plaintiffs were excluded from the counsels of the Germans with the 51% group respecting proposed concealment from the United States. App. to Cross-Petition, vii-viii.

plaintiffs were in fact excluded from the plans of the Germans to conceal from the United States. *Ibid.*

Our "real complaint" is not, as defendant suggests, that "the trial court did not give sufficient weight to the testimony which they claim absolved them * * *". Br. Opp. p. 14. We complain that the trial court based its findings on incredible inferences drawn from at best equivocal facts, that it totally ignored the contemporary documents and deposition testimony which exonerated plaintiffs and that it resolved all doubts against plaintiffs, error in a fraud case. We do not shrink from branding the findings as "manifestly wrong" (Br. Opp. 15), though in a fraud case we need not go so far, for there the government must prove its case by clear, convincing and unequivocal evidence.

2) Defendant first defends the "separate" Thorer & Hollender conspiracy evidence on the ground that it was "necessary to clarify the facts about Basch". Br. Opp. 15. Evidence of alleged participation by the 51% Basch group in a "separate" Thorer & Hollender conspiracy was not "clarification". For example, Koch's letter to Ward of April 13, 1940, respecting Thorer & Hollender (unprinted, attached to Defendant's Ex. 4), which refers to the fact that a stock dividend would make "more difficult the 'unscrambling of the [Thorer & Hollender] egg at such time when the world is again at peace * * * ", scarcely sheds light on plaintiffs participation in a Basch Co. conspiracy. Similarly, evidence that Swedish claimants to the vested Thorer & Hollender shares had consented to a dismissal of their suit with prejudice (Cross-Petition, 15) was aimed to prejudice, not to clarify, plaintiffs' position. Defendant's argument would wash away the entire "separate" conspiracy prohibition. For in every case the "separate" conspiracy evidence would "clarify" the participation of the "separate" conspirators in the other conspiracy.

Next defendant urges that plaintiffs may not object "since it was they who first went into the [Thorer & Hollender] matter," Br. Opp. 16, citing to testimony that plaintiffs were never apprised of Thorer & Hollender matters. Certainly this did not "open up" a vast amount of evidence respecting communications about a "separate" conspiracy between Hollender and his Thorer & Hollender associates. By "opening up" the issue plaintiffs did not waive the fundamental safeguard that there must be a tie-in to the "separate" conspiracy before statements by their alleged co-conspirators were admissible against them. Defendant signally failed to tie-in plaintiffs to the Thorer & Hollender conspiracy. Cf. Cross-Petition 12.

Defendant misleadingly suggests that the trial judge limited his consideration of the "separate" conspiracy evidence to the 1943 and 1947 sales, Br. Opp. 17. The trial court's reference to the Thorer & Hollender conspiracy in the midst of his discussion of the 1939 Basch "conspiracy", R. 81, shows that his consideration of the one was colored by the other.

3) We do not, as defendant suggests, insist that "it was incumbent upon the Government to prove by clear and convincing evidence that they engaged in a *criminal* conspiracy to defraud the United States * * *." Br. Opp. 17.

Defendant expressly pleaded a conspiracy to defraud the United States as a defense to a civil suit. R. 17, 24. He was under a burden to prove the fraud. Allegations of *civil* fraud impose a burden of proof by clear and convincing evidence on the government as upon all others. Cross-Petition 9, 16 at fn. 18. Only proof of fraud could rob plaintiffs' evidence of ownership of its efficacy. Cross-Petition 9 at fn. 8.

The lower court cases on burden of proof under the Act, cited by defendant, Br. Opp. 18, exhibit a mechanical,

unreflecting application of the general rule that a plaintiff has the burden of proof. But this has no application to a party constrained to be a plaintiff in order to recover property summarily seized from him. In no case was the constitutional argument proffered by plaintiffs herein even mentioned.

Defendant points to prize law for the rule he espouses. Br. Opp. 19. But as the Privy Council said with characteristic understatement:

> "Prize law has its own peculiar rules." In re Part Cargo SS Monte Contes, 60 Times L. Rep. 57, 58 (1943).

The rule respecting suspicious "contraband" developed by hard-pressed Britain on the high seas scarcely can serve as the test of the rights of an American to reclaim property summarily seized from him by the government within the United States.

Indisputably, the trial court, *after resolving all doubts* against plaintiffs found the case of fraud "clear". Br. Opp. 19. It found "no doubt" that plaintiffs employed German money, R. 80, despite the irrefutable testimony of the contemporary documents to the contrary to which it never alluded. App. to Cross-Petition ii-v. In his brief in opposition, defendant has studiously omitted to comment on the deposition and documentary testimony upon which his "clear" case founders.

4) Respecting the issue of interest, defendant would distinguish *McGrath* v. *Manufacturers Trust Company*, 338 U.S. 241, on the ground that plaintiffs, being

> "'cloaks', were accountable to the German former owners for interest, if they dissipated the dividends, comingled them with their own funds, or *failed to invest them.*" Br. Opp. 19-20.

Defendant's theory drives him to mounting absurdities. Defendant claimed interest on the dividends received by

plaintiffs without making deductions for the high bracket income taxes paid by them. Yet, these taxes, defendant argues, had to be paid for "a successful cloaking of German ownership". Respondent's Petition, 24. How could the bulk of the dividends necessarily paid as taxes be invested? Did such "necessary" tax payments "dissipate" the "trust" funds? And if defendant's theory is anything but the flimsiest after thought, why did he fail to appeal from the denial of interest from 1939 to December 28, 1948? R. 86, 32. Defendant seeks to graft an exception for "trusts" upon the unqualified prohibition of post-vesting interest in the McGrath case.

Respectfully submitted,

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